U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERT C. WILL and DEPARTMENT OF THE AIR FORCE, HEADQUARTERS, VANDENBERG AIR FORCE BASE, CA

Docket No. 98-1146; Submitted on the Record;
Issued October 18, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a stress-related or cardiac condition in the performance of duty; (2) whether the Office of Workers' Compensation Programs properly denied appellant's request for a hearing under section 8124 of the Federal Employees' Compensation Act.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a stress-related or cardiac condition in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's stress-related reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Act.[1] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.[3] This burden includes the submission of a detailed

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

In cases involving stress-related conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[5] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

In the present case, appellant alleged that he sustained a stress-related or cardiac condition as a result of a number of employment incidents and conditions. By decision dated September 9, 1997, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors.[7] The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Regarding appellant's allegations that the employing establishment issued unfair evaluations, wrongly denied compensatory time and unreasonably monitored his activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[8] Although the handling of evaluations, requests for compensatory time and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[9] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[10] Appellant did not submit any evidence showing that the employing establishment committed error or abuse with respect to

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] By decision dated December 17, 1997, the Office denied appellant's hearing request as untimely.

[8] *See Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[9] *Id.*

[10] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

these administrative matters. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant has also alleged that harassment on the part of his supervisors contributed to his claimed stress-related condition. Appellant alleged that Lt. Colonel Mark Schoning criticized his work performance in front of others and that on one occasion he insulted him when he stated, "It's hard to fly with eagles when you are with a bunch of turkeys." Appellant also alleged that Lt. Colonel Westfall threatened to have him fired. To the extent that disputes and incidents alleged as constituting harassment by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.[11] However, for harassment to give rise to a compensable disability under the Act, there must be evidence that harassment did in fact occur. Mere perceptions of harassment are not compensable under the Act.[12] In the present case, the employing establishment denied that appellant was subjected to harassment and appellant has not submitted sufficient evidence to establish that he was harassed by his supervisors.[13] Although Lt. Colonel Schoning acknowledged that he did make a comment similar to that attributed to him by appellant, the evidence reveals that the comment was not directed at appellant or intended as an insult to appellant. Lt. Colonel Schoning told appellant at the time of the comment that he was not referring to him as a "turkey."[14] Not every comment made in the workplace rises to the level of harassment and the Board notes that this isolated comment, when viewed in context, would not constitute harassment. Thus, appellant has not established a compensable employment factor under the Act with respect to the alleged harassment.

Regarding appellant's allegation of denial of promotions, the Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform his regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[15] Moreover, appellant's allegations that his subordinates were not promoted to an appropriate level would not constitute a compensable factor. Regarding appellant's allegation that he developed stress due to a reorganization of his work unit and insecurity about maintaining his position, the Board has previously held that a claimant's job insecurity, including fear of a reduction-in-force, is not a compensable factor of employment under the Act.[16] Thus, appellant has not established a compensable employment factor under the Act with respect to promotions and maintaining his position.

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[11] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[12] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

[13] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[14] The evidence reveals that Lt. Colonel made his comment after appellant uncharitably compared his management style to that of a prior supervisor.

[15] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

[16] *See Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

Appellant alleged that Lt. Colonel Schoning was tardy in performing such tasks as producing reports such that his job was adversely affected and claimed that Lt. Colonel Schoning had a habit of having meetings with his subordinates close to the end of the day. In addition to the fact that appellant has not established the factual aspects of these claims, the Board has held that an employee's dissatisfaction with perceived poor management constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.[17]

The Board has held that emotional reactions to situations in which an employee is trying to meet his or her position requirements are compensable.[18] Appellant alleged that he was placed in a stressful situation due to having to work without an adequate staff. The Board notes, however, that appellant has not established the factual aspect of this claim. Appellant's claim is undercut by his acknowledgment that certain programs were removed from his responsibility and additional subordinates were hired at various intervals. Moreover, the record reveals that appellant did not work any notable overtime.[19]

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained a stress-related or emotional condition in the performance of duty.[20]

The Board further finds that the Office properly denied appellant's request for a hearing under section 8124 of the Act.

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on a request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[21] As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.[22]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary

[17] *See Michael Thomas Plante*, 44 ECAB 510, 515 (1993).

[18] *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

[19] The record contains two brief statements from coworkers indicating that appellant was understaffed, but these statements lack probative value due to their lack of detail and vague nature.

[20] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[21] 5 U.S.C. § 8124(b)(1).

[22] *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

authority in deciding whether to grant a hearing.[23] Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to the Act which provided the right to a hearing,[24] when the request is made after the 30-day period for requesting a hearing[25] and when the request is for a second hearing on the same issue.[26]

In the present case, appellant's November 11, 1997 hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated September 9, 1997 and, thus, appellant was not entitled to a hearing as a matter of right. Hence, the Office was correct in stating in its December 17, 1997 decision that appellant was not entitled to a hearing as a matter of right because his hearing request was not made within 30 days of the Office's September 9, 1997 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office, in its December 17, 1997 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's hearing request on the basis that the case could be resolved by submitting additional evidence and requesting reconsideration. The Board has held that as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[27] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request which could be found to be an abuse of discretion.

For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

[23] *Henry Moreno*, 39 ECAB 475, 482 (1988).

[24] *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

[25] *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

[26] *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

[27] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

The decisions of the Office of Workers' Compensation Programs dated December 17 and September 9, 1997 are affirmed.

Dated, Washington, D.C.
October 18, 1999

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member